

FALCON GOLD ZIMBABWE LIMITED
and
INYAMAZANE GOLD (PRIVATE) LIMITED
versus
FISANI MOYO
and
IRVINE NGWENYA
and
SAMSON NGWENYA
and
ANDILE DHLAMINI
and
SHINGAI MOYO
and
TAKUNDA HATINA
and
ELVIS MOYO
and
DECEND MOYO
and
LONDILE MOYO
and
PHILASI NCUBE
and
JOHN MOYO
and
THE PROVINCIAL MINING DIRECTOR,
MATEBELELAND MINING DIRECTOR N.O
and
MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 19 October 2023

Judgment in respect of application for recusal

B K Mataruka, for the applicant
D Dube, for 1st – 10th respondents

ZHOU J: This is an urgent chamber application in which the two applicants seek an order interdicting the first to eleventh respondents, their employees, assignees, invites and all those claiming through them from mining any ore within the boundaries of the first applicant's mining claims located in Maphisa Kezi. The details of the specific mining claims are given in the draft provisional order. Applicants also seek an order interdicting the same respondents from removing any mined ore, dump or sands from the said claims boundary.

The matter was set down for hearing at 0830 hours today.

At the hearing the legal practitioner for the first to tenth respondents applied for the matter to be postponed on the ground that he only received instructions yesterday and would need time file opposing papers on behalf of those respondents. Mr *Mataruka* for the applicants informed that he did not oppose the application for postponement. He, however, advised that he had instructions to apply for my recusal from dealing with the matter. He proposed that we could deal with the recusal application.

I heard arguments from the applicants' counsel on the application for recusal. Since the application is in essence directed at the presiding judge or court, the respondents' counsel made no submissions in respect thereof.

The grounds for seeking recusal are two pronged. On the first ground the applicant's counsel submitted that I have previously dealt with an application instituted by the Minister of Mines and Mining Development in which an interdict was granted stopping the applicants from carrying on mining operations at the same claims, and that when the legal practitioners sought the reasons for judgment these were not forthcoming. Further, it is alleged that the applicants subsequently filed an application for leave to appeal which was placed before me but failed to get the outcome thereof despite numerous follow-ups being made. The essence of the argument seems to be that these facts alleged cause concern to the applicants, that they may not receive a fair hearing.

The alternative argument presented was that leaving aside the allegations pertaining to a failure to obtain the reasons for judgment and outcome of the chamber application for leave to appeal, I would still be disqualified purely on the basis that I had dealt with the application by the Minister pertaining to the disputed claims.

The principles that are applicable to an application for recusal based on bias are settled. They are grounded in the time-honoured principle of natural justice- *nemo iudex in sua causa*- which, when transliterated means, no man should be judge in their own cause. This principle is sometimes referred to as the rule against bias. The test is not whether the presiding officer is actually biased or will be biased but, “whether, having regard to those circumstances (cited) there was a real danger of bias....”. It has been held that “real danger” means real possibility of bias, see *Bailey v Health Professions Council of Zimbabwe* 1993 (2) ZLR 17 (S) at p 22D-F. In the case of *State v de Varies* 1964 (2) SA110 (E), cited in *Guvamombe v Ncube & Anor* 2019 (3) ZLR 272 (H) at 275G-276A, where the following passage is recited.

“Disqualification arises whenever the judge’s or magistrate’s relation to the parties is such, or his interest in the case is such, or his knowledge of the facts of the case or of the antecedents of the parties is such as would tend to bias his mind at the trial. In short, any condition of things which, reasonably regarded, is liable to destroy his impartiality should disqualify him.”

The test is objective, hence the expression that “whether there exist circumstances which may engender a belief in the mind of a reasonable litigant that in the... proceedings he would be at a disadvantage,” see *Leopard Rock Hotel Company (Pvt) Ltd v Wallen Construction (Pvt) Ltd* 1994(1) ZLR 255 (S). *Associated Newspapers of Zimbabwe (Pvt) Ltd v Diamond Insurance Company (Pvt) Ltd* 2001 (1) ZLR 226 (H). In *Mahlangu v Dowa* 2011 (1) ZLR 47 (H) the court held that the “test is a two-fold objective test (double reasonableness) that the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case.” Cited in *Guvamombe v Ncube N.O & Anor (supra)* at p 276G-H.

The first ground of the application is predicated upon incorrect facts. Mr *Mataruka* stated that the order in the case of *The Minister of Mines and Mining Development N O v Falcon Golf Zimbabwe Limited and Nyamazane Gold (Private) Limited* HC 4038/23 was delivered without reasons, and that the reasons were to follow on a subsequent. This is false. The matter was argued on 27 June 2023, and judgment was reserved. The full judgment with reasons was delivered three days later on 30 June 2023. There was no delivery of reasons in the open court for the unopposed matter on 5 July 2023 as submitted by Mr *Mataruka*. It is not the practice in this court of sending the reasons for a judgment that has already been handed down to be delivered in open court on a subsequent date even in circumstances where an order was made with reasons to follow. This is so because the operative date for a judgment is the date on which the order was pronounced. *In*

casu the judgment was delivered with the full reasons, as judgment number HH 403-23. Contrary to the submission by Mr *Mataruka* that he unsuccessfully sought for the reasons for the judgment, the copy of the judgment was actually attached as annexure “A” to the founding affidavit in the chamber application for leave to appeal that was filed under case number HC 4724/23, and the draft order in that case explicitly refers to it as the judgment of 30 June 2023. The date stamp on the attached copy shows that the judgment was uplifted on 6 July 2023.

It is also not correct that the chamber application for leave to appeal was placed before me. I called for the record from the Registrar, which shows that the matter was placed before CHINAMORA J. The Learned Judge wrote some comments which appear on the record itself. The legal practitioner could have easily inspected this record to check on its status.

In respect of the second ground of appeal, there would be need to objectively assess the facts relied upon. The parties to case number HC 4038/23 were the Minister of Mines and Mining Development as the applicant and the applicants herein who were the respondents. The first to twelfth respondents herein were not parties in HC 4038/23. In the present application, in para 11 of the founding affidavit, the applicants state explicitly that: “No relief is sought against the twelfth and thirteenth respondent in this matter....” The Minister is the thirteenth respondent *in casu*. Thus the first to twelfth respondents herein were not involved in the dispute in HC 4038/23. Further, the substance of the dispute in the two matters differs although the property is the same. In HC 4038/23 the Minister was the one who sought and was granted an interdict pending determination of the Supreme Court Appeal. He had the onus to prove the requirements for the relief that he was seeking them. *In casu* the dispute is essentially between the applicants and the first to eleventh respondents. The onus will be on the applicant to prove its entitlement to the relief in respect of those respondents. Any reasonable person knowing these facts would not have a reasonable apprehension of bias.

In all the circumstances, the application for recusation is meritless.

In the result, the application is dismissed.

Gill Godlonton & Gerrans, applicants’ legal practitioners.
Dube Legal Practice, first to tenth respondents’ legal practitioners